Petition

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SUPREME COURT, U.S.

Case No. 81 5734

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT IKE COMBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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ROBERT IKE COMBS,

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vs.

STATE OF FLORIDA,

Respondent.

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TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether a death sentence imposed upon a defendant which relies upon retroactive application of an aggravating factor violates Article I, Section 9 of the United States Constitution when the defendant was not given "fair warning" of its applicability and it does not inure to his benefit.

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The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix as item 1. (A1-10)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on July 30, 1981. (A1-10) Petitioner filed a motion for rehearing which was denied on October 5, 1981. (A11) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Supreme Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9 of the United States Constitution:

> No bill of attainder or ex poste facto law shall be passed.

2. Section 921.141, Florida Statutes (1979) which is set forth in the Appendix as item 3. (A12-13)

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Lee County on June 18, 1979, charged Robert Ike Combs with first-degree murder of Gay Lynn Parks; attempted first-degree murder of Robert Perry; and robbery with a firearm of Perry. (R1007-1008)[1/]

1/ The trial court dismissed the attempted first degree murder charge. (R1039)

Appellant proceeded to trial on April 21, 1980, and, after a four-day trial, was convicted of first-degree murder and robbery with a firearm. (R1060-1061) The Court then proceeded with the penalty phase of the trial. After argument and instructions, the jury recommended that Appellant die. (R1115)

Subsequently, Appellant moved for a new trial. (R1144-1145), but it was denied. (R1152) Finally, on June 11, 1980, the Court sentenced Appellant to death for the murder (R1163-1165), and to life (consecutively) for the robbery. (R1177) Supporting the death sentence, the Court found three aggravating factors: (1) The murder was committed in the course of a robbery, (2) it was heinous, atrocious and cruel, and (3) it was cold, calculated, and premeditated. (R1178-1180) §921.141(5), Fla.Stat. (1979)

The Court found two mitigating factors: (1) the defendant was 20 years old, and (2) he had no significant history of prior criminal activity. Section 921.141(6), Florida Statutes (1979)

Upon appeal, the Florida Supreme Court, in a 4-3 decision, upheld the trial court's judgment and sentence. Combs argued that the trial court had violated state and federal ex post facto prohibitions when it aggravated his sentence of death with Section 921.141(5)(i), Florida Statutes (1979). Effective July 5, 1979, that section authorized a court to impose a death sentence if:

> (i) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Florida Supreme Court, in holding that the retroactive application of this law did not violate any ex post facto provisions, said:

> Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of the defendant. (Slip opinion at page 6.)

On Friday, June 1, 1979, Robert Perry was paid approximately $100 for one week's work. (R396) Deciding to relax for awhile, he and Darrell Sharpe, a friend, went to the Sundog Bar in Bonita Springs to drink beer and shoot pool. (R397) About midnight they moved on to B & B Bar and drank some more beer. (R398) Sometime later, Combs approached Perry and asked him for a ride home. (R401)[2/] Perry was not leaving yet, but Combs said he would wait. (R403)

About that time Gay Lynn Parks drove up in her mother's car. (R403)[3/] After smoking some marijuana (R404), Perry, Parks, and Sharpe decided to leave the bar. IR405) Combs came out of the bar as they were leaving and got inside Perry's van with Sharpe. Parks followed in her car. (R405) They drove to Sharpe's house where Sharpe left the group and Parks parked her car and climbed into the van with Perry and Combs. (R405)

As the group drove off, they began talking about a party and Combs said he knew where one was. (R410) Before they went to the party, however, Perry took him to his house and then to a trailer where he bought a gram of cocaine for Parks and Perry. (R418) Perry paid $80 for the drug and tasted it to be sure it was the real thing. (R418)

Combs told Perry about a shortcut to the party and after traveling along some dirt roads, they pulled into a cleared area. (R421) The trio climbed out of the van and walked into the woods about 100 yards. (R429)

Combs, who was in the lead, stopped, turned and pointed a western type revolver at Parks and Perry. (R424) Parks became angry (R434) saying, "Oh, goddamn. I should have known better

---

[2/] Perry knew Appellant on a casual basis having seen him about town and at a house he and his girlfriend, Gay Lynn Parks, and her mother had gone to see. (R401)

[3/] Parks, 17, had come to Florida from Maryland with Perry in May. (R392) The couple lived in Perry's 1964 Chevy van outside of Sharpe's house. (R393)

than this. What are you doing?" (R430) In response, Combs told them to lie down. (R430) They refused (R432), and Parks, becoming angrier, continued cursing him saying, "I ain't laying down you motherfucker. What the hell do you think you're doing?" (R431) Combs insisted they lie down since they were dead anyway. (R432) Eventually they compromised by sitting. (R433)

He then demanded money and the cocaine, but Parks kept cursing him. (R433-434) Perry never did give Combs any money, but Parks took a small purse containing the cocaine from her pants and threw it into the bushes saying, "Here, go find it motherfucker." (R435) Combs, piqued by this, said he was going to shoot Perry first. (R435) Parks started to cry and then he shot her in the head. (R435)[4/]

Perry charged Combs but he was shot and fell to the ground unconscious. (R438) He awoke a while later and felt someone stuffing something into his pockets. (R435) He played dead and in a few minutes he heard the person move off into the bushes. (R442)

Perry crawled out of the woods to where the van was parked. Rather than getting in, he sat and watched for a few minutes. (R448) Shortly, the headlights came on and after stalling a couple of times, the van finally drove off. (R448) Perry then marked the spot with an "X" and an arrow pointing toward Parks' body. (R446) He went to the nearest house and summoned help. (R451) Soon the police arrived and, after finding Parks' body, took Perry to the Bonita Springs substation where he gave his statement. He did not, however, mention any use of cocaine. (R455) He made that admission ten days later. (R457)

4/ Two more shots were fired into her head. (R649) All three could have caused death and two would have caused instant death. (R649)

Shortly after Perry reported the murder, a BOLO (Be-on-the-Lookout) bulletin was transmitted for Perry's van. (R559) Officer Gutknecht of the Lee County Sheriff's Office spotted the van at 7:45 that morning parked about two miles from the murder scene and about one-half mile from Comb's house. (R561) Gutknecht called for help and within a few minutes several officers arrived. (R571) Clayton Combs, Combs' father, drove up as the policemen were surrounding the house. The elder Combs went in, came out, and shortly after, Combs also came out. (R571)

After waiving his rights, Combs talked to Sgt. Mitar about the murder. (R857-858) He admitted being with Parks, Perry, and Sharpe the night Parks was killed--partying with them, smoking marijuana and snorting cocaine. (R847-848) But, all was not right between Parks and Perry and the evening was punctuated by Perry slapping Parks (R846) and both swearing at one another. (R846) Moreover, when Combs gave Perry the gram of cocaine, Perry did not have the money to pay for it. (R846) Telling Combs he would get it for him the next day, Perry gave him the shotgun and a sword to hold until he came up with the money. (R847-848) They then dropped Combs off at his home. (R849)[5/] He was arrested about 8:30 that morning.

5/ Combs told Sgt. Mitar he did not recall how he got home, and the last thing he remembered was snorting some cocaine. (R888)

REASONS FOR GRANTING THE WRIT

A DEATH SENTENCE IMPOSED UPON A DEFENDANT WHICH RELIES UPON RETROACTIVE APPLICATION OF AN AGGRAVATING FACTOR VIOLATES ARTICLE I, SECTION 9 OF THE UNITED STATES CONSTITUTION WHEN THE DEFENDANT WAS NOT GIVEN "FAIR NOTICE" OF ITS APPLICABILITY AND IT DOES NOT INURE TO HIS BENEFIT.

The murder in this case occurred on June 1, 1979. Thirty days later, Section 921.141(5)(i), Florida Statutes (1979) became effective. That new section of Florida's death penalty statute was a new aggravating factor. It said:

> (i) A capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The trial court in this case found that this factor applied as well as the aggravating factor "that the capital felony was especially heinous, atrocious, and cruel." Section 921.141(5)(h), Florida Statutes (1979). On appeal, the Florida Supreme Court (in a four to three decision) said that the retroactive application of this new law was not violated by the federal ex post facto clause as

> ...the addition by the legislature of paragraph (i) to section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder...
>
> * * *
>
> Paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

In Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977) this Court held that because Florida's changes in its death penalty statute was procedural only, that Dobbert had "fair warning as to the degree of culpability which the state ascribed to the act of murder." Id., at 297. Moreover, because the changes were, if anything, more favorable to Dobbert, there was no basis for Dobbert to complain of the statutes retroactive application. Id., at 295.

Mr. Chief Justice Burger concurred in the opinion because Dobbert had constructive notice that death was the penalty for his actions and the new procedures were, taken as a whole, more favorable to Dobbert.

Justice's Stevens, Marshall, and Brennan, on the other hand, dissented on the ground that the "fair warning" test used by the majority was the incorrect test. Id., at 305. And, if applied to cases other than Dobbert's, it would defeat the purpose of the ex post facto clause. Id., 307-308.

This case presents to this Court the opportunity to further consider the implications and criteria of the "fair warning" test created in Dobbert. Under Florida law, prior to the enactment of Section 921.141(5)(i), execution style murders and cold, calculated killings often fell under the aggravating factor "especially heinous, atrocious, and cruel." Sullivan v. State, 303 So.2d 632 (Fla.1974); Magill v. State, 386 So.2d 1188 (Fla.1980). Thus, Combs had fair warning that his cold, calculated murder qualified as being especially heinous, atrocious, or cruel. The problem here is that the trial court found this murder to be both heinous, atrocious, and cruel as well as cold, calculated, and premeditated. The question thus became whether, under the "fair warning" test as devised in Dobbert, Combs had fair warning or constructive notice that his killing could have resulted in both aggravating factors applying to his case.

Moreover, this Court in Dobbert also characterized the change in Florida's death penalty statute as ameliorative, thus keeping it from being ex post facto. Dobbert at 296-297. In Weaver v. Graham, __U.S.__ 67 L.Ed.2d 17, 101 S.Ct.___ (1980), this Court focused upon this independent basis for determining if the retroactive application of a law was ex post facto. "Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Id., at 25.

In Weaver, this Court characterized the retroactive application of recent changes in Florida's "good" or "gain" time statute as more onerous than the earlier statute in effect when Weaver was sentenced. Hence, applying the new statute to him violated the Ex Post Facto Clause of the United States Constitution.

Analyzing the retroactive application of Section 921.141(5)(i) under this ex post facto test, the Florida Supreme Court said that the new section "inured" to petitioner's benefit. Three members of the Court, however, strongly disagreed, finding it hard to believe that the majority said that this new factor inured to Combs' benefit. (See footnote three of the dissenting opinion.)

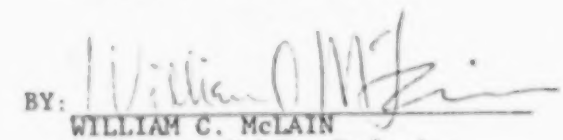
The effect of finding this aggravating factor in this case was to increase the liklihood that death would be imposed. While the Florida Supreme Court has said that the decision to impose death is a weighing process and not a mere summation of aggravating and mitigating factors, finding one unauthorized, additional aggravating factor not only increases the liklihood that death will be imposed, but can by itself justify imposition of death if there is nothing in mitigation. State v. Dixon, 283 So.2d 1 (Fla.1973)

Consequently, this case is an excellent vehicle to further develop the law around the "fair warning" test created in Dobbert or the "amelioration" test most recently followed in Weaver.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

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Appendix

APPENDIX

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1.	Opinion of the Supreme Court of Florida	A1
2.	Order denying Petitioner's Motion for Rehearing	A11
3.	Section 921.141, Florida Statutes (1979)	A12

Supreme Court of Florida

No. 59,425

ROBERT IKE COMBS, Appellant,

v.

STATE OF FLORIDA, Appellee.

[July 30, 1981]

PER CURIAM

Appellant, Robert Ike Combs, was convicted of murder in the first degree. The trial judge imposed the death sentence in accordance with the jury's advisory sentence recommendation. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. (1980). The appellant has asserted no trial errors in this appeal but contends the sentence of death was improperly imposed. We have reviewed the entire record and find the evidence is clearly sufficient to support the conviction. We further find the imposition of the death sentence for this robbery-execution slaying was appropriate.

The relevant facts presented at trial principally by a surviving victim, Robert Perry, are as follows:

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On June 1, 1979, Robert Perry was paid approximately $100 for one week's work, which he placed in an envelope in his pocket. He and a friend, Darrell Sharpe, went to a bar in Bonita Springs to drink beer and shoot pool. About midnight they moved on to a second bar and drank some more beer. Sometime later, appellant Combs approached Perry, who knew Combs slightly, and asked him for a ride home. Perry was not leaving yet, but Combs said he would wait. About that time, Perry's girl friend, Gay Lynn Parks, drove up in her mother's car. After smoking some marijuana, Perry, Parks, and Sharpe decided to leave the bar. Combs came out of the bar as they were leaving and got inside Perry's van with Perry and Sharpe. Parks followed in her car. They drove to Sharpe's house where Sharpe left the group and Parks parked her car and climbed into the van with Perry and Combs.

As the three drove off, they began talking about a party and Combs said he knew where one was. Perry then took Combs to his house and then to a trailer where Combs bought a gram of cocaine for Parks and Perry. After testing the drug, Perry paid Combs $80 for it. Combs then told Perry about a shortcut to the party, and after traveling along some dirt roads, they pulled into a cleared area. The three climbed out of the van and walked into the woods about 30 or 40 yards. Combs, who was in the lead, stopped, turned and pointed a western-type revolver at Parks. Parks became angry, saying, "Oh, goddamn. I should have known better than this. What are you doing?" In response, Combs told them to lie down. They refused, and Parks continued cursing Combs, saying, "I ain't laying down, you motherfucker. What the hell do you think you're doing?" Combs insisted they lie down since they were dead anyway. Eventually, Parks and Perry sat down.

Combs demanded money and the cocaine, and Parks kept cursing him. Perry never did give Combs any money, but Parks took a small purse containing the cocaine from her pants and threw it several feet from Combs, saying, "Here, go find it

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motherfucker." Combs, angered by this, said he was going to shoot Perry first so Parks could see him die. Parks started to cry, she told Perry she loved him, Perry told Parks he loved her, and then Combs shot Parks in the head. (He eventually fired two other shots into her head. Any of the three could have caused death and either of two of them would have caused instant death.) Perry charged Combs after the first shot into Parks, but he was shot in the head and fell to the ground unconscious. He awakened shortly and felt someone stuffing something into his pocket. (He later found the envelope in his pocket but without the remaining money.) Perry played dead and in a few minutes heard the person move off into the bushes.

Perry crawled out of the woods to the van but did not attempt to get in. Instead he sat on the ground a few minutes, and soon the van drove away. Perry went to the nearest house and summoned help. The police arrived and, with the assistance of police dogs, Parks' dead body was found. At 7:45 that morning, the van was found about two miles from the murder scene and one-half mile from Combs' house.

Shortly after the van was found, the appellant, Combs, was arrested at his home and taken to the police station, where he was immediately identified by Perry. Combs and Perry knew each other, and there was no issue concerning identity. There was a search made of appellant's room and van. None of the items seized were critical in the conviction, and no motion to suppress was filed by the appellant.

The appellant testified in his own behalf and admitted being with the principal witness, Perry, and the victim, Parks, on the evening of the murder and further testified that they smoked marijuana and snorted cocaine together on that evening. The appellant denied taking Perry and Parks into the woods and committing this murder. The jury returned a verdict of guilty of first-degree murder.

At the sentencing hearing neither party presented additional testimonial evidence in aggravation or mitigation, but

each side presented argument based upon the testimony presented in the cause. The jury returned a recommendation of death.

The judge imposed the death penalty, finding that "the murder of GAY LYNN PARKS . . . was committed while the defendant was engaged in, or was attempting to engage in, another violent felony, to wit: The robbery of ROBERT PERRY." Further, "the murder of GAY LYNN PARKS . . . was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification when according to his plan and design, the defendant lured the victim to her death in a remote, wooded located [sic]." Further, "[t]he capital felony was especially heinous and cruel in that the victim was defenseless, yet the defendant coldly and cruelly taunted the victim about her imminent death and proceeded to execute GAY LYNN PARKS despite her pleas and entreaties." The trial court determined that "the defendant, who is twenty years of age, had no significant history of prior criminal activity although he had previously pled guilty to third degree burglary and had been placed on probation for two years" and that "the defendant, thoughout the day prior to the murder, had, by his own account, consumed alcoholic beverages and indulged in cocaine. However, the Court finds that despite indulgence in these substances, the defendant's capacity to appreciate the criminality of his conduct and to conform his conduct with the requirements of law had not been substantially impaired." The trial court concluded that "the aggravating circumstances substantially outweigh the mitigating circumstances and require the imposition of the death penalty."

The appellant contends on this appeal that the trial court erred in imposing the death sentence, asserting that: (a) the trial judge improperly retroactively applied the aggravating circumstance that the murder was committed in "a cold, calculated and premeditated manner without any pretense of moral or legal justification" as set forth in section 921.141(5)(i), Florida Statutes (1979), which became effective July 1, 1979, thirty days after the murder was committed; (b) the trial court improperly

held the appellant's capacity to appreciate the criminality of his conduct could be considered in mitigation only if substantially impaired, as opposed to impaired to a lesser degree, by beer, marijuana, and cocaine; (c) the trial court was in error in finding the aggravating circumstance that this murder was heinous, atrocious, and cruel since, although it was trag.c. it was not shockingly evil or outrageously vile; (d) the finding by the trial court that the murder was committed in the course of a robbery and was cold, calculated, and premeditated amounted to an impermissible doubling up of aggravating factors, contrary to Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); (e) the finding of the trial court of both the aggravating circumstance of heinous, atrocious and cruel, and cold, calculated and premeditated constitutes two different names for the same aspect of the murder and therefore, in effect, is a doubling up; and (f) the trial court erred by limiting the jury consideration of mitigating factors. We find each of these contentions to be without merit, and only the first requires discussion.

We find no error in the application of section 921.141(5)(i), Florida Statutes, which became effective July 1, 1979, adding as an aggravating circumstance:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

If the legislature had added an entirely new factor as an aggravating circumstance, then retroactive consideration would have violated the prohibition against ex post facto laws as set forth in Weaver v. Graham, 49 U.S.L.W. 4155 (1981), and in State v. Williams, No. 59,451 (Fla. April 9, 1981). However, the addition by the legislature of paragraph (i) to section 921.141(5), in fact only reiterates in part what is already present in the elements of premeditated murder, with which petitioner was charged and which the evidence clearly supports. Although consideration of aggravating factors must be limited to

those set forth in the statute, Elledge v. State, 346 So. 2d 998 (Fla. 1977); Purdy v. State, 343 So. 2d 4 (Fla.), cert. denied, 434 U.S. 847 (1977); the elements of the specific offense charged are and must be inherently part of the circumstances taken into consideration when imposing a sentence in a capital case as well as in other criminal cases. As Justice Adkins stated in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943 (1974):

> The aggravating circumstances . . . actually define those crimes -- when read in conjunction with Fla. Stat. §§ 782.04(1) [homicide statute] and 794.01(1) [former rape statute], F.S.A. -- to which the death penalty is applicable in the absence of mitigating circumstances.

What, then, does paragraph (i) add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant. In the instant case both felony murder and premeditated murder were charged and proven, and the evidence is overwhelming that the murder was "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The trial court's finding that aggravated circumstance (i) existed was proper.

With regard to the other aggravating circumstances expressly found to exist in this cause, we agree it was appropriate for the trial judge to find upon the record that this premeditated murder was committed while the appellant was engaged in a robbery and that this murder was heinous, atrocious, and cruel. The circumstances are factually very similar to the robbery-execution slaying of Sullivan v. State, 303 So. 2d 632 (Fla. 1974) (Overton, J., concurring), cert. denied, 428 U.S. 911

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(1976), in which the death penalty was upheld. For the reasons expressed, we find that the imposition of the death sentence was appropriate in this cause.

Counsel for appellant, in his oral argument before this Court, stated that he did not address any trial errors but he may find it necessary to raise issues in later post-conviction relief proceedings under Rule of Criminal Procedure 3.850 concerning whether trial counsel provided this appellant with reasonably effective assistance of counsel in the trial now here on review. Section 921.141(4) requires that the "judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court . . . after certification by the sentencing court of the entire record. . . ." We construe that terminology to require a full record review for trial error and a determination of the sufficiency of the evidence, as well as the appropriateness of the imposition of the death sentence. If appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in either the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceedings.[1] State v. Meneses, 392 So. 2d 905 (Fla. 1981). No trial court

[1] In an unreported order in Francis v. State (No. 50,127) dated June 20, 1978, we relinquished jurisdiction to permit appellant to file a motion pursuant to Florida Rule of Criminal Procedure 3.850, raising a claim of ineffective assistance of counsel. Appellant was subsequently adjudged not to have been accorded effective assistance of counsel and was granted a new trial. See also Antone v. State, 382 So. 2d 1205 (Fla.), cert. denied, 101 S. Ct. 187 (1980), in which this Court remanded for testimony on an application for new trial based upon a relationship, between the state and a key trial witness, that was unknown to either side until the appeal was pending.

error has been presented to us, and from our review of the record we find none. We find the evidence is not only sufficient but overwhelming for the conviction of this appellant of first-degree murder.

We affirm the conviction and the sentence of death.

It is so ordered.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., Concur
SUNDBERG, C.J., Concurs as to the conviction and dissents as to the sentence with an opinion, with which ENGLAND and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SUNDBERG, C.J., concurring in part and dissenting in part.

I concur in the affirmance of the conviction. I feel, however, that the retroactive application of section 921.141(5)(i), Florida Statutes (1979), violates the state and federal prohibitions against ex post facto laws. Therefore, I respectfully dissent from the affirmance of the sentence of death.

The trial court's use of section 921.141(5)(i) as an aggravating circumstance directly contravenes two recent decisions, Weaver v. Graham, 49 U.S.L.W. 4155 (1981), and State v. Williams, No. 59,451 (Fla. Apr. 9, 1981). Weaver sets forth the two elements which must be present in order for a law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."[1] In Williams, this Court relied on Weaver in formulating the following twofold test for determining whether a law was ex post facto: (1) does the law attach legal consequences to crimes committed before the law took effect, and (2) does the law affect the prisoners who committed those crimes in a disadvantageous fashion?"[2] Under the facts in the present case, both these requirements are satisfied. The new law did attach legal consequences to crimes committed before the law took effect because an additional aggravating circumstance was considered which affected the determination of the sentence. The second requirement is met because the likelihood of receiving a death sentence is increased by the addition of the new subsection.[3] A finding of this additional aggravating circumstance could shift the balance toward death.

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1. 49 U.S.L.W. at 4157.

2. Slip op. at 3.

3. I must confess that it is beyond my powers of comprehension to understand how the majority can seriously contend that the addition of subsection (i) as an aggravating circumstance "inure[s] to the benefit of a defendant."

Based on the fact that section 921.141(5)(i) was unconstitutionally applied to the defendant, the judge improperly considered a non-statutory aggravating circumstance. There were also two mitigating circumstances in this case, thus Elledge v. State, 346 So.2d 998 (Fla. 1977), requires that this case be remanded to the trial judge for resentencing.

ENGLAND and McDONALD, JJ., Concur

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Supreme Court of Florida

MONDAY, OCTOBER 5, 1981

ROBERT IKE COMBS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 59,425

Circuit Court No. 79-465CF-TSR
(Lee)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur
SUNDBERG, C.J. and McDONALD, J., dissent

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Sonya Carver
Deputy Clerk

TC
cc: Hon. Sal Geraci, Clerk
Hon. Thomas S. Reese, Judge

David A. Davis, Esquire
James S. Purdy, Esquire

A11

SECTION 921.141, FLORIDA STATUTES (1979)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defenant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

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SUPREME COURT, U.S.

Case No. 81 5784

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT IKE COMBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, ROBERT IKE COMBS, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

81 5784

ROBERT IKE COMBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, ROBERT IKE COMBS, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on April 25, 1980, in the Circuit Court for Lee County, Florida, for first degree murder, and robbery with a firearm in a single jury trial.

2. I received a sentence of death for first degree murder and a consecutive life sentence for robbery and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed all of my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Robert Ike Combs
ROBERT IKE COMBS

Subscribed and sworn to before me this 12th day of November, 1981.

Notary Public

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 1, 1982

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for ROBERT IKE COMBS, the Petitioner, hereby certify that on November 24, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion For Leave To Proceed In Forma Pauperis with attached Affidavit on each of the parties as follows:

On the State of Florida, The Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to James S. Purdy, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florid 33602.

BY: William C. McLain
WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Opposition

Case No. 81-5784

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1981 TERM

ROBERT IKE COMBS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA

CHARLES CORCES, JR.
Assistant Attorney General

-and-

SAMUEL ROBERT MANDELBAUM
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OPINION BELOW

The opinion of the Florida Supreme Court sought by Petitioner for review is officially reported as Combs v. State, 403 So.2d 418 (Fla. 1981).

STATEMENT OF THE CASE

The Respondent herein, the State of Florida, will rely upon the Florida Supreme Court's recitation of the facts and case in the above-reported decision.

SUMMARY OF THE ARGUMENT

The Petitioner has not presented a real and substantial federal question for review. This Court in Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 344 (1977) has already determined that changes in the Florida death sentencing statute are "clearly procedural" and do not change the quantum of punishment. Thus, any modification of the procedure which becomes effective after the crime cannot constitute an ex post facto violation. Further, Petitioner was on constructive notice that the death penalty might follow his actions.

ARGUMENT

THIS COURT SHOULD NOT ISSUE THE WRIT SINCE THERE IS NOT ANY REAL AND SUBSTANTIAL FEDERAL QUESTION FOR REVIEW IN THIS CAUSE.

As a general rule, in order for a state court decision to be subject to certiorari review by this Honorable Court on the ground that a "federal question" is involved, it is necessary that such a question be "real and substantial." Martin v. Walton, 368 U.S. 25 (1961); Wilner v. Character Committee, 373 U.S. 96 (1963). The United States Supreme Court has always been wary of assuming jurisdiction of a case from state court on grounds of a "federal question," and a policy of strict necessity will be applied. Mental Hygiene Department v. Kirchner, 380 U.S. 194 (1965); Sanks v. Georgia, 401 U.S. 144 (1970).

In this proceeding, the Petitioner has challenged the retroactive application of the 1979 amendments to Section 921.141 Florida Statutes (1979) as violative of Article I, Section 9 of the United States Constitution. Since the provisions of Article I, Section 9 apply only to Congress and not to the states, Smith v. State, 87 N.E. 2d 881 (Ind. 1949), it can only be assumed that the purported ex post facto violation sub judice would arguably fall within the restrictive scheme of Article I, Section 10 of the Constitution, which reads as follows:

> "No State shall . . . pass any . . . ex post facto law . . ."

In any event, the requirement of a real and substantial federal question has not been met in this certiorari proceeding since the question has already been posed and answered by this Court in Dobbert v. Florida, 432 U.S. 282, 53 L. Ed. 2d 344 (1977); rehearing denied, 434 U.S. 882, 54 L. Ed. 2d 166 (1977). In applying this Court's analysis and reasoning as recited in Dobbert, it becomes apparent that the 1979 amendments contained in Section 921.141 of the Florida Statutes are not prohibited ex post facto laws with regard to the Petitioner.

In Beazell v. Ohio, 269 U.S. 167, 169-170, 70 L.Ed. 216 (1925), this Court summarized the characteristics of an ex post facto law:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an *act* previously committed, *which was innocent when done;* which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

In applying the foregoing definition, this Court in Dobbert found that the 1972 changes in the then new Florida death sentencing procedure was "clearly procedural." 53 L.Ed.2d at 356. This Court emphasized in Dobbert . . .

> "The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."
>
> 53 L.Ed.2d at 356

As being the situation, this Court concluded that Dobbert was not the victim of an ex post facto violation despite the fact that he had committed the murders before the new death penalty statute was enacted. In reaching this conclusion, this Court relied upon its prior decision in Beazell, in which the Court found that a procedural change was not ex post facto "even though the change was by no means ameliorative." Dobbert, 53 L.Ed.2d at 355.

The 1979 Amendment modifying the Florida Death Penalty statute includes the following additional aggravating circumstance:

> (i) A capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> [Fla. Stat. §921.141(5)(i)]

It is the reliance upon the foregoing aggravating circumstance in Petitioner's sentencing hearing that is the subject of this proceeding. The foregoing 1979 amendment, contained in Florida Senate Bill No. 523, was passed by the Florida Senate on May 23, 1979 and by the Florida House of Representatives on May 31, 1979. See Fla. Journal of the Senate (1979 Regular Session, page 517); Fla. Journal of the House of Representatives (1979 Regular Session, pages 951-952). Subsequently on June 1, 1979, the Petitioner committed the brutal slaying for which he stands convicted. Combs, 403 So.2d at 419. The foregoing legislation was then approved by the Governor of Florida on July 3, 1979, 32 days after the killing. Two days later, the legislation was filed with the Florida Secretary of State, taking effect immediately. See Laws of Florida, Chapter 79-353. Thus, the amendments having been passed in both houses of the Florida legislature before the instant murder occurred, the Petitioner was at least constructively on notice of these impending modifications in the Florida death sentencing procedure.

In this cause, as in Dobbert, the 1979 modifications to the Florida death penalty statute are "clearly procedural." Accordingly, the retroactive application of the amendment cannot serve as the basis for an ex post facto violation in the Petitioner's situation. The modifications appearing in the 1979 amendment are in toto merely further refinements of the already-existing procedural criteria for determining whether death is an appropriate punishment in a given case. These procedural criteria have repeatedly been modified, refined, explained and defined over the past nine years, through both legislative amendments and judicial decisions. While this Court in Dobbert was presented with an entirely novel Florida death sentencing procedure which included eight new statutory aggravating factors and seven new statutory

mitigating factors, the Court in this proceeding is faced with modifications of that same statute which contain the addition of but one statutory aggravating factor. This Court did not deem the then new procedure to be an ex post facto violation in Dobbert, and similarly cannot consider the 1979 modifications to be such a violation.

Further, a broader analysis, based upon Chief Justice Burger's concurring opinion in Dobbert, lends support to a conclusion than an ex post facto violation does not exist in this cause. Justice Burger noted what he considered to be the "crucial factor":

> ". . . when Petitioner committed the crime, a Florida Statute permitted the death penalty for the offense. Petitioner was at least constructively on notice that this penalty might indeed follow his actions."
>
> 53 L.Ed.2d at 363

Sub judice, the Petitioner was similarly on constructive notice that the death penalty might indeed follow his premeditated slaying of his victim.

The Petitioner has placed undue reliance upon this Court's decision in Weaver v. Graham, ___U.S.___, 67 L.Ed.2d 17 (1981). In Weaver, this Court recently held that retroactive application of the new Florida "gain time" law was violative of the prohibition against ex post facto laws since the law "substantially alters the consequences attached to a crime already completed, and *therefore changes 'the quantum of punishment'*." 67 L.Ed.2d at 25. Under the new Florida "gain time" law, an inmate's opportunity to earn early release was constricted, thus making the punishment lengthier and more onerous for crimes committed before its enactment. 67 L.Ed.2d at 27. In

contrast, this Court in Dobbert emphasized that the 1972 statutory changes in the death sentencing procedure (including the introduction of eight new statutory aggravating factors and seven new statutory mitigating factors) did not change the quantum of punishment since they were "clearly procedural." 53 L.Ed.2d at 356. Thus, Weaver has no bearing on the question sub judice.

CONCLUSION

In sum, the Petitioner has failed to present a real and substantial federal question for review to this Court. This Court's decision in Dobbert is entirely dispositive of whether the Petitioner's sentencing under the 1979 procedural amendments was an ex post facto violation. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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